No. 98-1828

IN THE

Supreme Court of the United States

October Term, 1998

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* JONATHAN STEVENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA and WYOMING IN SUPPORT OF PETITIONER

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STATEMENT OF AMICI INTEREST

The States of New York, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming urge this Court to reverse the decision and order of the United States Court of Appeals for the Second Circuit which held that the petitioner, Vermont Agency of Natural Resources, was a "person" subject to the liability provisions of the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and that it could be sued by a private citizen under that statute.

This appeal presents two important issues affecting the liability of States under the FCA. Both issues are of fundamental importance to the States and have been the subject of recent conflicting determinations by the United States Courts of Appeals. The first issue is whether a State is a "person" who may be sued under the FCA. The second is whether a State's Eleventh Amendment immunity prevents a private citizen, known as a *qui tam* relator, from prosecuting the FCA suit against a State to reap a financial reward. Although the lawsuit is brought "in the name of the Government," the relator sues for himself as well as for the United States. 31 U.S.C. § 3730(b)(1).

The decision below undermines the *amici* States' interests and upsets the federalist balance in two important ways. First, its holding that States are subject to suit under the FCA exposes the States and their taxpayers to very significant financial liability. Second, its holding that States can be sued by private citizens undermines the States' sovereignty and weakens the States' ability to administer complex federal programs.

With respect to financial liability, the FCA provides for treble damages and a civil penalty of not less than $5,000 and not more than $10,000 for filing false claims. *See* 31 U.S.C. § 3729(a).[1] In many cases, the penalty provision has been construed to apply to each claim filed.

Under many federal programs, States or entities they regulate file thousands of claims and numerous reports each year with federal agencies. Because a single policy or practice that is found to be wrongful could taint each and every claim filed, and because there is a six-year statute of limitations under the FCA, a single state policy or practice exposes the States to enormous civil penalties together with three times the actual damages incurred by the federal government.

For example, in *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (5th Cir. 1999), the plaintiff alleged that staff physicians at Texas Tech Health Sciences Center routinely signed patient charts and Medicare/Medicaid billing forms certifying that they personally performed or supervised the performance of treatment for patients when in fact the patients were allegedly seen only by residents. The *qui tam* relator alleged that based upon this wrongful practice, the State defendant submitted over 400,000 false claims and received over $20 million in overpayments. *Foulds*, 171 F.3d at 282 & n.2. Because each false claim could result in a penalty of up to

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[1] The original statute provided for recovery of double damages and a penalty of $2,000, which this Court found to be compensatory based on the government's additional costs in attempting to recover money owed to it. *See United States v. Halper*, 490 U.S. 435, 446 (1989); *United States v. Bornstein*, 423 U.S. 303, 314-15 (1976); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943). The 1986 FCA amendments increased the remedy to treble damages and the penalty to a fine of $5,000 to $10,000. False Claims Amendments Act of 1986, Pub. L. 99-562, §2, 100 Stat. 3153 (1986).

$10,000, the State's liability in that case could amount to hundreds of millions, or even billions, of dollars.

The States' fiscal concerns are not simply a matter of conjecture. Since the FCA was amended in 1986, "[r]ewards in the tens of millions have been reported in a single suit." *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 222 (2d Cir. 1998) (Weinstein, J., dissenting), *cert. granted*, 119 S. Ct. 2391 (1999). Federal grants to State and local governments more than doubled from $115 billion in 1988 to $230 billion in 1997. *See Federal Expenditures by State for Fiscal Year 1997* at 46, Table 11 (April 1998), Bureau of the Census, U.S. Department of Commerce, Publication FES/97. A substantial portion of that money comes from social welfare programs, such as Medicaid, which are ready targets for FCA lawsuits because their complex regulatory scheme and vast scope often result in overpayments to States. *See, e.g., Stevens*, 162 F.3d at 222 (discussing shift in emphasis under the FCA from defense-contractor cases to health care-related cases arising under the Medicare and Medicaid programs) (Weinstein, J., dissenting).

With respect to the issue of State sovereignty, the lower court's holding that a private person *qui tam* relator can sue a State despite the bar of the Eleventh Amendment seriously weakens the State's ability to administer complex public assistance and police power programs. States administer these federal programs, such as Medicaid, Aid To Families With Dependent Children (now Temporary Assistance To Needy Families) and the Clean Water Act, under a scheme that has been described as one of "cooperative federalism." *New York v. United States*, 505 U.S. 144, 167 (1992). When a private person is authorized by Congress to sue a State with respect to its administration of one of these complex programs, the State loses a meaningful opportunity to resolve the matter through negotiation or through

the political process, even if such a resolution would be in the public interest.

For example, the underlying dispute in this case concerns whether the Vermont Agency of Natural Resources properly used an accounting mechanism to reflect the time employees spent on federal projects. In the ordinary course, this type of dispute would be resolved administratively between the state agency and the federal agency. However, the relator does not share the federal government's broader interest in maintaining harmonious relations with the States. The relator's sole concern is to reap a huge reward. As Judge Weinstein points out, the relator's allegations "drive[] a wedge between the two agencies, inhibiting a productive, collaborative partnership, generating suspicion and turning what should be a cooperative relationship into a strained and awkward one." *Stevens*, 162 F.3d at 229 (Weinstein, J., dissenting).[2]

Furthermore, because the private party is seeking only to obtain a large settlement or judgment, he does not concern himself with the disruption that burdensome discovery and trial will have on the States' administration of the program. Counsel for the relator in *Long*, for example, sought and obtained the production of voluminous documents from the New York State Education Department. He also noticed numerous depositions of current or former State employees.

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[2] In *United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870 (D.C. Cir.), *op. supplemented*, 173 F.3d 890 (D.C. Cir. 1999), the United States elected to intervene only against the private co-defendants. Judge Silberman found that this "suggests that the government does not lightly take on the task of probing into the internal operations of the sovereign states, and may well think it better to leave such politically unpalatable tasks for the *qui tam* relators of the world." *Long*, 173 F.3d at 885.

Both issues presented in the petition therefore involve important matters of federalism that affect the States' relations with the federal government. A reversal of the rulings below is essential to ensure that the States' sovereignty is protected against unnecessary encroachment by the United States and the principle of cooperative federalism is maintained.

SUMMARY OF ARGUMENT

For 136 years, the FCA has imposed liability upon any "person" who engages in specified conduct to defraud the United States but it has not defined the word "person." According to well-established rules of statutory construction, the ordinary meaning of the word "person" does not include a State. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). That construction is to be followed absent "affirmative evidence" that Congress intended to cover States in the FCA.

Furthermore, where a federal statute alters the federal balance of powers, the "plain statement" rule requires that Congress expressly make known within the law itself its decision to include States. This ensures that Congress has in fact confronted, and intended to impose, the new liability upon the States. The FCA results in an alteration in the federal balance of powers because it gives more authority to the federal government, which can now sue a State for treble damages and civil penalties, and it authorizes private citizens to sue States and disrupt the States' administration of complex social welfare and police power programs.

The FCA does not contain a "plain statement" that States are subject to the liability provision. The language used in other sections of the original and amended statute together with the legislative history contain no "affirmative evidence" that Congress intended to include States as defendants in FCA lawsuits. In fact, the statute and its history support the opposite view -- States were not meant to be subject to the liability provision of the FCA. Therefore, because the statute does not expressly apply to a State, the "plain statement" rule requires that States not be included within the scope of 31 U.S.C. § 3729(a).

The decision below should also be reversed on the second ground presented in the petition, that a private person, acting as a *qui tam* relator, cannot sue a State under the FCA because of the bar of the Eleventh Amendment to the U.S. Constitution. Under this Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996), Congress does not have the authority to abrogate a State's immunity from suit by private citizens in federal court under its Article I power. There is no dispute that the FCA was enacted pursuant to Congress' Article I power. Therefore, a private citizen's FCA suit against Vermont should be barred.

The relator cannot avoid the State's Eleventh Amendment immunity defense by claiming that he "stands in the shoes of the government." The language and structure of the *qui tam* provisions of the statute, as well as this Court's decision in *Hughes Aircraft* Co. *v. United States ex rel. Schumer*, 520 U.S. 939 (1997), demonstrate that the *qui tam* relator sues *for himself* as well as for the United States and that he has an independent interest in, and significant control over, the litigation.

Even if the relator were considered to be the agent or designee of the federal government, this Court has strongly suggested in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991), that the United States is without authority, absent "compelling evidence," to delegate or assign its right to sue a State to a third party. In *Alden v. Maine*, 527 U.S. ---, ---, 119 S. Ct. 2240, 2264 (1999), this Court stated that there must be "compelling evidence" in the constitutional design that the States had waived their immunity in state court. *See Alden*, 119 S. Ct. at 2255. The respondent and the United States have completely

failed to present any evidence that the State's waiver of immunity "in the plan of the convention" with respect to the federal government extends to anyone whom the United States might select to sue on its behalf. Accordingly, the *qui tam* provisions of the FCA run afoul of the Eleventh Amendment.

ARGUMENT

POINT I

A STATE IS NOT A "PERSON" SUBJECT TO SUIT UNDER THE FALSE CLAIMS ACT.

A State is not a "person" within the meaning of the liability provision of the FCA under two well-established rules of statutory construction. First, statutes which impose liability upon a "person" are not construed to apply to States unless there is affirmative evidence that Congress intended to include them. In the FCA, neither the legislative history nor the statutory context contains affirmative evidence of inclusion. Second, when Congress enacts a statute which shifts the balance of power from States to the federal government, or otherwise interferes with the States' sovereignty, it must make explicit in the law that States are covered. The FCA is such a law and there is no "plain statement" that States are covered by the statute.

A. Under Both The "Ordinary Rule of Statutory Construction" and the "Plain Statement" Rule, The Word "Person" In The Liability Section of the False Claims Act Should Not Include A State.

"'[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'" *Will*, 491 U.S. at 64 (quoting *Wilson*

v. Omaha Tribe, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941))). This rule of exclusion applies to the sovereign enacting the statute as well as to States. *Long*, 173 F.3d at 874 n.4, citing *Will*, 491 U.S. at 64. Absent "affirmative evidence" that Congress intended to include States in a law which would expose them to liability, this particular rule of statutory construction compels their exclusion. *See Long*, 173 F.3d at 874. As discussed in Point I(B) *infra*, such "affirmative evidence" is completely absent in the history of the FCA statute.

In addition, when a federal statute alters the federal-state balance of powers, the "plain statement" rule requires that Congress specifically include States within the text of the statute. This Court has set forth the circumstances under which the "plain statement" rule applies. The rule applies when Congress enacts a law which: (1) alters the usual balance of power between the state and federal governments, (2) pre-empts the historic powers of the States, or (3) imposes a new condition on the States' receipt of federal money.

The rule is derived from principles of federalism and a respect for state sovereignty. A "plain statement" compels Congress to address expressly the effect of including States within federal statutes that could alter the ordinary balance of power between the state and federal governments or otherwise interfere with state sovereignty. As Justice Marshall explained in *United States v. Bass*, 404 U.S. 336 (1971):

> [i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 349. *See also Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991) ("the requirement of a clear statement by Congress to impose such [monetary] liability [on the States] creates a rule that ought to be of assistance to Congress and the courts in drafting and interpreting legislation."); *California State Bd. of Optometry v. Federal Trade Comm'n*, 910 F.2d 976, 981 (D.C. Cir. 1990) ("This rule of statutory construction serves to ensure that the States' sovereignty interests are adequately protected by the political process."). The application of the FCA to States fits squarely within the circumstances in which the "plain statement" rule applies.

First, the rule applies when a federal statute alters the constitutional balance of power. Thus, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will*, 491 U.S. at 65 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

Such an alteration occurs when Congress abrogates the States' Eleventh Amendment immunity because "abrogation of sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States'." *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (quoting *Atascadero*, 473 U.S. at 238). Because a *qui tam* lawsuit under the statute abrogates State sovereign immunity (*see* Point II *infra*), a "plain statement" that States are covered by the law is required.

The federal balance of power can also be shifted when Congress enacts a law which exposes a State to a new liability since the liability may result in diminished authority for the States. In *Will*, this Court applied the rule to a statute, 42 U.S.C. § 1983, "where it [was] claimed that Congress has subjected the States to liability to which they had not been subject before." *Will*, 491 U.S. at 64.

When Congress subjects States to a new and substantial damages liability, such as the treble damages and civil penalty provisions of the FCA, the usual federal balance of powers has been shifted away from the States to the national government. In these circumstances a "plain statement" of inclusion is "of assistance" to the courts in evaluating Congress' intent. *See Hilton*, 502 U.S. at 206.

The "plain statement" rule is particularly applicable when a federal statute imposes punitive type damages on the States. At common law governmental entities were not subject to punitive damages because it was believed such damages punish blameless taxpayers. It has been considered to be "contrary to sound public policy" to impose punitive damages on a governmental entity absent clear Congressional intent. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263 (1981). By providing for treble damages and increasing the amount of the civil penalty to $10,000, the 1986 FCA amendments in fact "created a form of punitive damages that would be palpably inconsistent with state liability." *Long*, 173 F.3d at 877; *see also United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 349 (S.D.N.Y. 1998).

Second, the "plain statement" rule applies when Congress enacts a law which undermines the historic or essential powers of the States. For example, in *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), the Court determined that Congress must explicitly state its intent to include state court judges under the Age Discrimination in Employment Act because their inclusion interferes with a State's fundamental role in defining the qualifications of its judiciary.

An FCA *qui tam* lawsuit seriously interferes with the States' ability to administer essential state programs. While the statute is concerned with ensuring that the federal government recover money wrongfully obtained, the underlying allegations in FCA

lawsuits against States will frequently involve the States' administration of complex federal programs. As the D.C. Circuit properly concluded in *Long*:

> To characterize the relevant state function at issue, as the Second Circuit did, as *fraudulent conduct* ... is to assume the conclusion that the function is not an essential one.... [T]he Act's imposition of liability necessarily interferes with a state's sovereign performance of a range of indisputably essential functions, such as the administration of a state education department involved in the present case.... That the federal government funds in part that function does not destroy its essentiality to the state.

Long, 173 F.3d at 887-888 (emphasis in original) (citations omitted).

Third, the "plain statement" rule applies when Congress imposes a condition upon the States' receipt of federal funds which preempts the State's traditional authority. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 16 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). The reason for this aspect of the rule is that "[b]y insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17.

The fact that States may be compelled to pay treble damages and civil penalties under the FCA must be viewed as an additional condition for the States' receipt of federal money. When States accept federal funds under other federal programs, they agree to repay the amount of money that they are overpaid, not treble damages and civil penalties. Therefore, Congress must explicitly inform the States in the FCA that they are subject to

this additional condition for their receipt of federal funds under other federal programs.

In sum, the "plain statement" rule must apply to the FCA because it (1) alters the usual constitutional balance of powers, (2) interferes with States' administration of essential programs, and (3) imposes a new condition on the receipt of federal money. Because the FCA does not contain a "plain statement" that a State is a liable "person", States must be excluded from the coverage of the statute.[3]

B. The Legislative History of the False Claims Act Does Not Contain "Affirmative Evidence" That Congress Intended The Word "Person" To Include States.

There is no "affirmative evidence" in the legislative history of the FCA that Congress intended to *include* States within its scope. The FCA was adopted in 1863 to combat rampant fraud by large private contractors during the Civil War. *See Bornstein*, 423 U.S. at 309; *Marcus*, 317 U.S. at 547. By enacting the FCA, Congress sought to stop this plundering of the Union's treasury. *See, e.g., Cong. Globe*, 37th Cong., 3d Sess., 952-958 (1863).

As originally enacted, the statute prohibited "any person not in the military" from submitting a false claim for payment to the United States. Where liability was found, the statute provided

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[3] The Second Circuit's decision in *Stevens* and the Eighth Circuit's decision in *United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 154 F.3d 870 (8th Cir. 1998), misapply these rules of statutory construction in several areas principally because they fail to take account of the extent to which the statute interferes with the States' sovereign interests. In *Long*, the D.C. Circuit took great pains to explain the errors in those decisions. For purposes of this brief, we refer to that decision which properly evaluates the States' interests under the FCA.

for both civil penalties (double damages plus a fine of two thousand dollars and costs) and possible criminal imprisonment. *See* Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698. Thus, the legislative context in which the word "person" was used strongly suggests that States were not included because a State plainly could not submit a claim to the United States for payment of military expenses.

Similarly, the 1863 legislative debates centered around individual plunderers, not States. *See, e.g., Cong. Globe*, 37th Cong., 3d Sess. 955 ("The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such") (remarks of Sen. Howard); *id.* at 958 ("if a man swindles the government in times like this there ought never to be any limitation") (remarks of Sen. Grimes).

In an attempt to counter the original statutory language and legislative history, the United States argues that fraud by state officials was a concern of Congress at the time. It relies on a legislative report by a House investigating committee that reported in 1862 upon the grossest frauds on the government concerning war contracts. *See* H.R. Rep. No. 2, 37th Cong., 2d Sess. (1862). There is a brief discussion in the report of wrongful actions taken by state officials. However, in that discussion, "the report specifically stated that these examples of fraud were not committed *against* the United States government." *Long*, 173 F.3d at 876 (quoting H.R. Rep. No. 2, 37th Cong., 2d Sess. at xxxviii) (emphasis in original). In fact, the committee report suggests that the States were often victims of fraud, not perpetrators: "[i]n this emergency, of all others, the State and the nation should demand the highest integrity of those invested with public trusts, and each should hold their agents, by rigid scrutiny, to a severe accountability." H.R. Rep. No. 2, 37th Cong., 2d Sess., at xxxix.

There is also no evidence that the discussion in the report concerning state officials was even considered by the Congress the following year when it enacted the FCA. The sole reference to this report during the following year's debate over the FCA was by Senator Wilson of Massachusetts, who referred to the committees' work in discussing a proposed amendment to the bill that had to do only with *private contractors* and had nothing to do with States. *Cong. Globe*, 37th Cong., 3d Sess., 956. Furthermore, even if Congress had intended to include state officials as "persons," the United States confuses the wrongful actions of individual state officials with the imposition of liability under the FCA against States. In *Will*, this Court specifically rejected the argument that Congress intended to include States within the coverage of 42 U.S.C. § 1983 even though there was debate in Congress of the effect of including state officials within the civil rights statute. *Will*, 491 U.S. at 68-69; *see also Long*, 173 F.3d at 876.

For 123 years, from 1863 until 1986, the statute was "largely unchanged." H.R. Rep. No. 99-660, at 17 (1986). In 1982, the wording of the liability section was slightly revised to "[a] person not a member of an armed force of the United States." There was no intent to make any substantive change. *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877; H.R. Rep. No. 97-651, at 1, 3, 143 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1897, 2037.

In 1986, the FCA was substantially amended. Congress sought to provide stronger measures to combat fraud, and to encourage "private" individuals to sue private enterprise. S. Rep. No. 99-345, at 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5288-89; H. Rep. No. 99-660, at 23 (1986); *United States ex. rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995) (*en banc*), *cert. denied*, 517 U.S. 1233 (1996). Despite major changes to the statute in 1986, the liability provision in 31 U.S.C. § 3729(a) continued to apply to

"[a]ny person." The only change made to the scope of that provision was that persons in the military were now made subject to the FCA. The legislative history indicates that this change was limited to the military and was not intended otherwise to broaden the class of persons who could be held liable under the Act. *See* S. Rep. No. 99-345, at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5283; *see also Long*, 173 F.3d at 876; *Graber* 8, F. Supp. 2d at 354-55. In fact, the Congressional Budget Office advised that the 1986 amendments were "expected to involve no significant costs to the federal government or to State or local governments." S. Rep. No. 99-345, at 37 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5302.[4]

Thus, Congress in 1863 did not intend to include States within the liability provision of the FCA and, since that time, Congress has maintained virtually the same words to define liability without any intent to broaden the coverage under the statute to include States. There simply is no argument to be made from this history that Congress provided "affirmative evidence" of an intent to include States within the scope of the liability provision of the statute.

A finding that the FCA cannot be applied to the States does not leave the United States without viable remedies. Most federal programs contain provisions requiring States to repay monies improperly received. *See*, *e.g.*, 7 U.S.C. § 2020(g) (Food Stamps); 42 U.S.C. § 604 (Aid To Families With Dependent Children); 42 U.S.C. § 1396(c) (Medicaid). Although rarely used, the federal government has the authority under many of

[4] The D.C. Circuit in *Long* properly concluded, based upon a detailed analysis of the 1986 amendments, other textual changes made in the course of the 1986 FCA amendments and the legislative history, that there is no "affirmative evidence" to even suggest that a State was intended to be included as a liable "person" as a result of the 1986 amendments. See *Long*, 173 F.3d at 876-879, for a complete discussion of this history.

these programs to terminate federal financial participation for substantial noncompliance. *See*, *e.g.*, 42 U.S.C. § 1316(a) (Social Security, Supplemental Security Income and Medicaid). If existing administrative remedies are inadequate to ensure the recovery of money erroneously or wrongfully obtained by the States, those mechanisms should be improved rather than having the plain language of the FCA ignored.

POINT II

THE ELEVENTH AMENDMENT BARS THE FEDERAL COURTS FROM EXERCISING JURISDICTION OVER A FALSE CLAIMS ACT LAWSUIT BROUGHT BY A *QUI TAM* RELATOR AGAINST A STATE

The Eleventh Amendment functions as a limitation upon the federal court's authority under Article III of the Constitution. Under this Court's decision in *Seminole Tribe of Florida*, Congress is without authority, by virtue of the Eleventh Amendment, to allow a private citizen to sue a State in federal court under a statute enacted under Article I of the Constitution. Because the FCA was enacted under Article I and a *qui tam* relator is a private citizen suing a State, a suit by a *qui tam* relator against a State is barred.

The federal government asserts that the Amendment does not apply because the relator simply stands in its shoes. However, the statutory scheme of the FCA establishes that the relator asserts his own cause of action based upon a legal interest in the lawsuit that is separate from that of the United States.

Furthermore, Congress may not delegate the United States' right to sue a State to a private citizen relator. The States'

consent to suit in the "plan of the convention" by the United States does not extend to private citizen *qui tam* relators because there is no "compelling evidence" that States agreed to such suits in the constitutional design. Indeed, the United States and the relator have presented no such evidence with respect to a *qui tam* lawsuit.

A. The Eleventh Amendment Bars A Suit By A Private Citizen Against A State Under A Federal Statute, Such As The False Claims Act, Enacted Under Article I of the Constitution.

The Eleventh Amendment exemplifies the principle of state sovereign immunity that was implicit in the design of the Constitution when it was ratified. *See, e.g., Alden*, 119 S. Ct. at 2246-47 ("the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today"); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997).

The Amendment ensures that state sovereign interests are protected from suit in federal court by private citizens. It prevents a federal court from entertaining a lawsuit and issuing a judgment for money damages that must be paid out of a State's treasury. *Seminole Tribe of Fla.*, 517 U.S. at 58. The Amendment's "very object and purpose ... [was] to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers*, 123 U.S. 443, 505 (1887); *see also Alden*, 119 S. Ct. at 2247; *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy Inc.*, 506 U.S. 139, 146 (1993).

This Court has broadly interpreted the Amendment. Since 1890, it has been construed to prevent a private citizen of the *same State* (as well as a citizen of another State or a foreign State) from suing the State in federal court. *Hans v. Louisiana*,

134 U.S. 1 (1890). With only two exceptions, neither of which apply to the FCA,[5] a private citizen is prevented, as a consequence of the Eleventh Amendment, from seeking any relief in federal court against a State or a State agency. *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144; *Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 480 (1987); *Edelman*, 415 U.S. at 662-63; *Ex parte New York*, 256 U.S. 490, 497 (1921).

Consequently, the Eleventh Amendment prevents Congress from authorizing a private citizen to sue a State in federal court under a statute enacted under Article I of the Constitution. *Florida Prepaid*, 119 S. Ct. at 2205; *Seminole Tribe of Fla.*, 517 U.S. at 72-73. Because there is no dispute that "the FCA was enacted under Article I of the Constitution," a lawsuit brought by a private party against a State arising under the FCA should be barred by the Eleventh Amendment. *Stevens*, 162 F.3d at 223 (Weinstein, J., dissenting).

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[5] First, a State may consent to be sued by expressly waiving its immunity. *Alden*, 119 S. Ct. at 2258; *Seminole Tribe of Fla.*, 517 U.S. at 65; *Atascadero*, 473 U.S. at 238; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Second, Congress may enact appropriate legislation under § 5 of the Fourteenth Amendment to enforce the provisions of the Fourteenth Amendment and therein expressly authorize a suit by a private party against a State. *Alden*, 119 S. Ct. at 2267; *Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. ---, ---, 119 S. Ct. 2199, 2205 (1999); *Seminole Tribe of Fla.*, 517 U.S. at 55, 59, 65-66; *Atascadero*, 473 U.S. at 246.

B. The Qui Tam Relator Does Not "Stand In The Shoes" Of The United States.

The United States is not prevented by the Eleventh Amendment from suing a State in federal court.[6] According to the federal government, the *qui tam* relator's suit is also not barred by the Amendment because the relator "stands in the shoes" of the United States which is "the real party in interest." The argument is wrong because it is based upon an incorrect analysis of the role of the relator in the FCA statutory scheme.

It has long been recognized that in a *qui tam* action the relator "states that he sues *as well* for the state *as for himself*." *Black's Law Dictionary* 1251 (3d ed. 1969) (emphasis in original). This rule continues to apply to the FCA.

The original FCA statute provided a financial reward for "the person bringing said suit and *prosecuting it to final judgment*." Act of Mar. 2, 1863, ch. 67, § 6, 12 Stat. 698 (emphasis added). The statute now provides that "[a] person may bring a civil action for a violation of section 3729 *for the person* and for the United States Government." 31 U.S.C. § 3730(b) (emphasis added).

Those courts which have rejected a State's Eleventh Amendment immunity on the theory that the *qui tam* relator has no interest in the FCA lawsuit because he or she acts merely as the "agent" or "delegee" of the United States, which is the only "real party in interest" in the FCA lawsuit, misconstrue the statutory

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[6] This Court has explained that, with respect to the United States, there has been "'a surrender of this [Eleventh Amendment] immunity in the plan of the convention.'" *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-323 (1934)(quoting *The Federalist No. 81*); *see also West Virginia v. United States*, 479 U.S. 305, 311 (1987); *United States v. Texas*, 143 U.S. 621, 644-45 (1892).

scheme.[7] The fact that the United States may receive the largest share of the proceeds or that the "focus of the Act is on exposing fraud on the government and recovering resulting government losses" (*United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998)), does not mean that the *qui tam* relator is without his own legal interest. *See also Long*, 173 F.3d at 883-84; *Foulds*, 171 F.3d at 290.

The structure of the FCA ensures, in two principal respects, the *qui tam* relator's status as a separate party with an independent interest in the FCA lawsuit. First, the statute provides the relator with a significant financial interest in the judgment or settlement. It provides that the relator's share of the damages and penalties "shall be not less than 25 percent and not more than 30 percent of the proceeds." 31 U.S.C. § 3730(d)(2). The relator is also entitled, if he prevails, to attorney's fees, costs and expenses from the defendant. 31 U.S.C. §§ 3730(d)(1), (2).

Second, the statute gives the relator a substantial right to prosecute the FCA lawsuit to final judgment or settlement. The

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[7] *See, e.g., Zissler*, 154 F.3d at 872 ("[T]he United States is the real party in interest because of its significant control over the course of the litigation and its dominant share of the proceeds thereof.... [T]he relator 'has no interest in the matter whatever except as [a common informer].'") (quoting *Marvin v. Trout*, 199 U.S. 212, 225 (1905)); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1215 (9th Cir. 1996)("*qui tam* plaintiffs are merely agents suing on behalf of the [United States] government, which is always the real party in interest"); *United States ex rel. Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir.) ("In a qui tam action, the plaintiff sues on behalf of and in the name of the government and invokes the standing of the government resulting from the fraud injury.... The government remains the real party in interest, however, in the FCA suit."), *cert. denied*, 508 U.S. 973 (1993); *United States ex rel. Milam v. Univ. of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992) ("A qui tam relator is essentially a self-appointed private attorney general, and his recovery is analogous to a lawyer's contingent fee. The relator has no personal stake in the damages sought--all of which, by definition, were suffered by the government.").

FCA provides that, if the Government decides not to intervene at the outset or move to dismiss the action, the relator has the "right" to prosecute the action through final judgment or settlement. 31 U.S.C. §§ 3730(b)(4)(B), (c)(2)(A), (c)(3). The relator is then responsible for all aspects of the case, including discovery, trial preparation and trial. *See Foulds*, 171 F.3d at 293 ("It is Foulds--not the United States as sovereign--who controls all strategic litigation decisions in the case ... and it is Foulds who maintains sole responsibility for financing the litigation and for its costs.").

Although the United States can seek to intervene at a later stage of the proceedings, the federal government must show "good cause" to do so. 31 U.S.C. § 3730(c)(3). In addition, when the United States intervenes at a later stage, it does so "without limiting the status and rights of the person initiating the action." 31 U.S.C. § 3730(c)(3). If the Government intervenes and attempts to settle the case, the court must hear any objections by the relator to the proposed settlement. 31 U.S.C. § 3730(c)(2)(B). *See Gravitt v. General Electric Co.*, 680 F. Supp. 1162, 1165 (S.D. Ohio) (upholding relator's objection to government's proposed settlement and allowing relator to proceed with the FCA action despite government's position), *dismissed without op.*, 848 F.2d 190 (6th Cir.), *cert. denied sub nom. General Electric Co. v. United States*, 488 U.S. 901 (1988).[8]

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[8] The Courts of Appeals are divided as to whether, if the relator wishes to settle the case where the federal government has not intervened, the United States is entitled to review and, if appropriate, veto the proposed settlement. *Compare Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154, 158-60 (5th Cir. 1997) (government has power to veto settlement because the United States is a real party in interest even if it does not control the FCA suit), *with United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 723 (9th Cir. 1994) (federal government's consent to dismissal is only required during the initial 60-day period (or any extensions of that period) when the federal government decides whether or not to intervene in the FCA lawsuit).

Thus, according to the scheme of the FCA, the *qui tam* relator does not "stand in the shoes of the government." Rather, as Judge Panner recognized in his opinion in *Rodgers, supra*:

> This action was commenced, and is being prosecuted, by two private citizens. The United States was not consulted before this action was filed. It did not screen the claims before filing to ensure that prosecution was warranted, and it has since declined to prosecute this action in its own right.... The United States has little control over the conduct of this litigation, unless it intervenes as a party or by moving to dismiss the action.

Rodgers, 154 F.3d at 869 (Panner, D.J., dissenting) (footnote omitted).

C. This Court's Decision In *Hughes Aircraft Co. v. United States ex rel. Schumer* Supports The States' Eleventh Amendment Defense.

This Court's recent decision in *Hughes Aircraft* is entirely consistent with the State's Eleventh Amendment defense. It recognizes that the *qui tam* relator has a separate interest in the FCA lawsuit.

Hughes Aircraft was commenced and prosecuted by a relator based upon allegedly false claims submitted by the company between 1982 and 1984. Because the United States had declined to intervene or to move to dismiss the action, the FCA lawsuit was being prosecuted only by the *qui tam* relator. *Hughes Aircraft*, 520 U.S. at 943 n.2. Under the provisions of the FCA in effect when the conduct occurred, the relator's suit would have been dismissed because the suit was based on information the government had received. *Id.* at 952. However, the relator did not sue until after 1986 and, as a result of the 1986 FCA

amendments, the relator's suit might be allowed. The question presented to and decided by this Court was whether the 1986 amendment was retroactive.

In holding that the amendment was not retroactive, the *Hughes* Court reasoned that a suit by the relator stands on a different footing from a suit by the United States. Therefore, even though the federal government's alleged injury was the same, the fact that the relator could not sue the company prior to 1986 but might be able to sue it after 1986 changed the substance of the cause of action. *Id.* at 948. Justice Thomas explained the basis for this conclusion:

> As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good....*Qui tam* relators are thus less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc.

Id. at 949 (footnote omitted); *see also id.* at 949 n.5 ("That a *qui tam* suit is brought by a private party 'on behalf of the United States,' ... does not alter the fact that a relator's interests and the Government's do not necessarily coincide"); *Long*, 173 F.3d at 884 ("[T]he procedural question of in whose name the suit must be brought is distinct from the substantive legal question whether the plaintiff has a cause of action.") (citation omitted).

Thus, *Hughes Aircraft* stands for the proposition that the *qui tam* relator has a separate legal interest in the FCA lawsuit from that of the United States. Consequently, he stands as a private party who has commenced and is prosecuting a lawsuit against a State without the State's consent to suit.

D. The States Did Not, In The "Plan Of The Convention," Consent To Be Sued By A Private Qui Tam Relator Who Has A Separate Legal Interest In The False Claims Act Lawsuit.

Even if the *qui tam* relator is considered to be "standing in the shoes" of the federal government, the Eleventh Amendment would still bar the relator's lawsuit. The States did not consent to be sued, in the "plan of the convention," by a private *qui tam* relator whom the United States designates to assist it under the FCA.

The Constitution establishes a system of "dual sovereignty." *Gregory*, 501 U.S. at 457; *see also Alden*, 119 S. Ct. at 2247. Under a system of dual sovereignty, this Court must find *compelling evidence* of a waiver of sovereign immunity before it concludes that the States' surrender of immunity in the "plan of the convention" to the United States included suits commenced and prosecuted by private citizens on behalf of the federal government. *See Alden*, 119 S. Ct. at 2255 ("In exercising its Article I powers Congress may subject the States to private suits ... only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design."). The federal government, however, has put forth no evidence at all to show that the States intended, at the time of ratification, to consent to be sued by *qui tam* relators who prosecute lawsuits on their own behalf as well as on behalf of the federal government.

In *Blatchford* this Court strongly indicated that the States' waiver of immunity to the United States does not extend to private parties who sue a State "on behalf" of the United States. *Blatchford* held that Alaska Native villages could not sue a State in federal court and that the jurisdictional provision authorizing a suit by a tribe, 28 U.S.C. § 1362, did not abrogate the States' Eleventh Amendment immunity. Because the United States is

authorized in appropriate cases to sue a State as the trustee of the tribe, the tribes argued, *inter alia*, that Congress had enacted through 28 U.S.C. § 1362 "a general delegation of the authority to sue on the tribes' behalf from the Federal Government back to tribes themselves." *Blatchford*, 501 U.S. at 783.

The *Blatchford* Court rejected the tribes' argument. Justice Scalia expressed serious doubt that Congress had the authority to circumvent a State's sovereign immunity by delegating to a tribe the power to sue a State on behalf of the United States:

> We doubt, to begin with, that that sovereign exemption *can* be delegated -- even if one limits the permissibility of delegation (as respondents propose) to persons on whose behalf the United States itself might sue. The consent, 'inherent in the convention,' to suit by the United States -- at the instance and under the control of responsible federal officers -- is not consent to suit by anyone whom the United States might select....

Id. at 785 (emphasis in original).

Considered together, *Alden* and *Blatchford* are entirely supportive of the States' argument that the *qui tam* provisions of the FCA violate the Eleventh Amendment because there has been no showing that the States' consent in the "plan of the convention" extended to private *qui tam* relators.

In *Stevens*, the Second Circuit reasoned that *Blatchford* is inapposite because the tribes were seeking to sue in their own behalf for payment of money to themselves and not, as here, on behalf of the United States. *Blatchford*, however, cannot be so easily distinguished. As Judge Silberman wrote in *Long*:

> It seems to us that permitting a *qui tam* relator to sue a state in federal court based on the government's exemption from the Eleventh Amendment bar involves just the kind of delegation that *Blatchford* so plainly questioned.... The problems inherent in expanding the states' consent to suit by the United States to suits 'by anyone whom the United States might select,'... are no less troublesome where, as here, the injury on which the suit is premised is a pecuniary injury to the United States.

Long, 173 F.3d at 882 (citations omitted); *see also id.* at 883 ("[T]he United States' very ability to sue as the tribes' trustee, which was unquestioned in *Blatchford*, depended on an injury to the United States as sovereign when injury was inflicted on the tribes.... It does not seem reasonable, therefore, to distinguish *Blatchford* as an anti-delegation principle applicable only where the 'injury' is an injury to someone other than the United States."); *Foulds*, 171 F.3d at 293 (same); *Rodgers*, 154 F.3d at 869 (Panner, J., dissenting) (same); *Stevens*, 162 F.3d at 224 (Weinstein, J., dissenting) (same).

In sum, the *qui* tam relator cannot sue a State under the FCA through a fiction that he simply "stands in the shoes" of the federal government. If the United States determines that it must pursue litigation against a State, it may not sit on the sidelines and allow the *qui tam* relator to assume the unpalatable task of prosecuting an FCA lawsuit against a State. In the event this Court finds that a State is a "person" subject to suit under the FCA, it must then conclude that the *qui tam* lawsuit is barred by the Eleventh Amendment.

CONCLUSION

The decision and order of the Second Circuit should be reversed in its entirety.

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